Notice of Judgment No. 25. Issued November 25, 1908.

United States Department of Agriculture,

OFFICE OF THE SECRETARY,

BOARD OF FOOD AND DRUG INSPECTION.

NOTICE OF JUDGMENT NO. 25, FOOD AND DRUGS ACT.

MISBRANDING OF A DRUG.

(Harper's Cuforhedake Brane Fude or Cuforhedake Brain Food.)

In accordance with the provisions of section 4 of the Food and Drugs Act of June 30, 1906, and of regulation 6 of the rules and regulations for the enforcement of the act, notice is given of the judgment of the court, as hereinafter set forth, in the case of the United States against Robert N. Harper for violation of sections 1 and 2 of the aforesaid act, lately pending in the Police Court of the District of Columbia.

On August 27, 1907, an inspector of the Department of Agriculture purchased from a firm of retail druggists in Washington, D. C., samples of a preparation contained in bottles encased in cartons, upon the principal side of each of which was printed the following:

HARPER'S CUFORHEDAKE BRANE-FUDE.

Read inner circular.

Guaranteed under the Food and Drug Act,
June 30, 1906. No. 6707.

Each Oz. contains 30% alcohol and 16 grs.
acetanilid.

A positive relief for Headache, Neuralgia,
Nervousness, Insomnia, &c.

It is taken in doses of two teaspoonfuls in a little water and repeated in 20 or 30 minutes if not relieved, and again in 30 minutes after the second dose, if that should not give the desired effect.

For insomnia, two teaspoonfuls at bed time; for nervousness, two teaspoonfuls every 2 or 3 hours.

Price, 25 Cents.
Manufactured by
ROBERT N. HARPER,
Laboratory and Office,
467 C Street N. W.,
Washington, D. C.

60293—08

The bottles were similarly labeled and the words "Harper's Cuforhedake Brain Food, Washington, D. C.," were blown in the glass. A folded circular inclosed with each bottle contained, among other things, the following statements:

"A most wonderful, certain and harmless relief," and "The rapidity by which it cures and the after effects being pleasant and without any depression whatever, containing no morphine or poisonous ingredients of any kind, is, I think, sufficient guarantee of its superior qualities."

The preparation was duly analyzed in the Bureau of Chemistry of the Department of Agriculture, and it was found that it consisted of the following ingredients:

Alcohol (per cent by volume)	24.2
Acetanilid (grains per ounce)	15.0
Caffein (per cent)	1.5
Antipyrin (per cent)	1.0

Potassium, sodium, and bromids also present.

After comparison of this analysis with the aforesaid labels and statements, the Secretary of Agriculture was of the opinion that the preparation was misbranded within the meaning of section 8 of the Food and Drugs Act of June 30, 1906. Accordingly, on October 17, 1907, in pursuance of the provisions of section 4 of the act, he afforded the dealers from whom the samples were purchased a hearing at the Bureau of Chemistry of the Department. The manufacturer and vendor of the preparation, Robert N. Harper, also appeared and participated in the hearing. As no evidence was produced tending to show fault or error in the aforesaid analysis, the Secretary reported the facts to the Attorney-General. The facts were duly referred to the United States Attorney for the District of Columbia, who, on January 14, 1908, filed an information in the Police Court of the District of Columbia against Robert N. Harper, alleging the manufacture and sale by him in the District of Columbia of a misbranded drug, contained in bottles and cartons and accompanied by circulars upon and in which were blown and printed certain false and misleading statements regarding it, that is to say. That the said drug was a "Cuforhedake Brane-Fude" or "Cuforhedake Brain Food;" that said drug contained no poisonous ingredients of any kind; that said drug was a harmless relief; and that each ounce thereof contained 30 per cent of alcohol.

The defendant having entered a plea of not guilty, the case was duly submitted to a jury upon testimony, argument of counsel, and the following instructions of the court:

IVORY G. KIMBALL, *Judge.*

Gentlemen of the jury: I want to congratulate you upon your arrival at the last stage of this very long, but very interesting and important case. As was stated by Mr. Baker, the United States District Attorney, it is the first case under the Pure Food

Law in any court in the country, and it is one that may, in its final results, test many questions that are raised by the law and necessary to its proper administration, which questions must be finally settled by the courts.

The act known as the Pure Food Law was passed on the 30th of June, 1906, but did not go into effect, as far as this case is concerned, until the 1st of January, 1907, thus giving to manufacturers a chance of changing their labels and packages, if they found it necessary to do so, and giving opportunity to dealers to get rid of any drug that might come under the purview of the law. So that in this case, as you have noticed in the prayers, the date is given to you as from January 1, 1907, up to the date of the filing of this information.

The information as originally filed had four counts, but the Government has abandoned the second and third; and, therefore, in your deliberations you will take no account of the second and third counts, but will confine yourselves to the first and fourth.

The first count relates to the manufacture of a misbranded drug; the fourth count relates to the sale of such a misbranded drug.

There was no law on this subject before the passage of this act. So that up to the 1st day of January, 1907, this drug might have been legally branded as the Government claims it was branded after that date; but from the 1st day of January, 1907, the law of June 30, 1906, went into effect, and is effective upon all manufacturers coming within its purview.

The first section of this information charges that the defendant, Robert N. Harper, manufactured a drug which was misbranded; and to fully inform you as to what is meant by the law by "misbranded," I will state what the law requires, because the law uses the word "misbranding" and then defines it, and the court and jury are bound by the definition of misbranding as laid down in the law. The term applies to all drugs or articles of food, or articles which enter into the composition of food, "the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular."

You will notice how broad the law is in its definition. If it is found from the evidence that in any particular this drug known as "Harper's Cuforhedake" misstates or states falsely, then the law has been violated. It is not necessary that each one and all of them have been broken, but the law says "in any particular." So that if you find from the evidence that in any one point there has been a misbranding under the definition which I have read to you then you shall find a verdict of guilty.

I might say here that there are several items in this first count which, before entering upon the trial, Mr. Baker, on behalf of the Government, abandoned. So, in considering this, you will only take into account the items that I shall name, they being the only items on account of which Mr. Baker says the law was violated.

The first claim that he made is that said drug was not a cure for headache, nor a food for the brain, and I want to read in that connection, because the words "Cure" and "Brain Food" have been referred to by each one of the counsel who has appeared before you, the prayer that I have granted as to the meaning of those words:

"The jury are instructed that in determining the meaning of the words 'brain-food,' 'cure,' 'poisonous,' and 'harmless,' the definition of which has been called into question by this inquiry, they are to give such words their ordinary and customary meaning as understood by the general public and not a technical meaning as given by any expert witness."

This law was passed not to protect experts especially, not to protect scientific men who know the meaning and the value of drugs, but for the purpose of protecting ordinary citizens, like the jury and like counsel and others, who have learned during the hearing of this trial a great deal more about these things than they ever knew before in all their life.

In determining the meaning of the words used upon these cartons, bottles, and circulars, they are to be taken in the way that an ordinary, plain, common citizen, without scientific knowledge, would understand them if they were put before him.

And so with regard to this "Cuforhedake," you can take it to mean what an ordinary man would take it to mean—the meaning which it conveys to an ordinary person when he gets a remedy said to be a cure for headache. The first prayer as presented to me on the part of the Government touches that subject. I do not know that it is necessary for me to read it to you again. It has been read three times. If that word, spelled in the two different ways that it is spelled, would convey to the ordinary citizen the idea that it was a food for the brain as contradistinguished from the idea of a food for the whole body, then it is—and I so charge you in this first prayer—misleading, and therefore a violation of the law; and if you find that such a definition is what the ordinary citizen would apply to it, then you, under that first prayer, would be compelled to bring in a verdict of guilty, and you have the right, in considering that question, to take it in the connection in which it is placed. You have the right to consider that it is on a medicine which it is claimed is a cure for headache, an ache which is supposed by most citizens to be from the brain, and the words brain food spelled in the two different ways you have had demonstrated to you so many times are used in connection with a cure which is said to cure the headache—an ache that is seated in the head. You have a right to consider all that. How would an ordinary citizen, in taking that up and seeing these words, understand it? What would he understand by the use of those words?

I have granted some other prayers where the subject of brain food is referred to.

MR. BAKER. If your Honor please, when you read the other ones, will you spell out the words?

THE COURT. The jury are further instructed that if they find from the evidence that the use by the defendant of the name "branefude" as a part of the name of the defendant's preparation was not reasonably or fairly calculated to deceive or lead to the belief that the preparation was a food for the brain, then they shall find that the use by the defendant of the word "branefude" was not false or misleading. That is the question that I suggested to you a moment ago. How would the ordinary citizen, upon reading that, understand it? If it would mislead him or have a tendency to mislead him, then the case is made out. If there is nothing in the term in the way in which it is used that would mislead an ordinary citizen, then, of course, that, under the prayers that I have granted, is to be taken into consideration by you.

MR. BAKER. Would your Honor read that first prayer now?

THE COURT. I will read, at the request of counsel, the first prayer:

"If the jury find from the evidence beyond a reasonable doubt (and you gentlemen are old jurors and understand perfectly well what is meant by a reasonable doubt. I need not again charge you on that point, because you have had that charge over and over again. The doubt must be a reasonable one—one that a reasonable man would entertain from the evidence), that the defendant Robert N. Harper, on the fifth day of August, 1907, or at any time between the first day of January, 1907, and the date of the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated 'Harper's Cuforhedake Brain Food,' or 'Harper's Cuforhedake Brane Fude,' and did place on the bottle, box, or circular thereof the following statements, designs, and devices, or any of them, viz, 'Cuforhedake Brain Food' or 'Cuforhedake Brane Fude,' unless you further find from the evidence that there is a known and distinct kind of food that feeds and nourishes the brain as distinguished from a food that feeds and nourishes the whole body, and that the said drug or preparation is a food, and that it feeds and nourishes the brain particularly, as distinguished from a food that nourishes all parts of the body, then the jury are instructed as a matter of law that the words

'Brain Food' and 'Brane Fude'—if you find that 'Brane Fude' means brain food—are false and misleading, and your verdict shall be guilty on the first count of the information; and if the jury further find that the defendant did sell or offer for sale to the said Stone & Poole, on the date or within the time mentioned and in the District of Columbia, the said drug in this prayer described, they shall find the defendant guilty on the fourth count of the information."

The next objection that is made in this information is "nor did said drug contain any poisonous ingredients of any kinds."

Gentlemen, the question raised is not whether it is a poison in the doses prescribed in the preparation. That is not the question before you as jurors. You have nothing to do with the question of whether it is poisonous in the doses prescribed or in larger doses. The sole question raised here for you to consider is whether the said drug contains poisonous ingredients of any kind. If you find from the evidence, beyond a reasonable doubt, that it did contain poisonous ingredients, whether taken in the doses named, whether they would or would not be harmful—if you find that the drug contained a poisonous ingredient—then your verdict must be guilty, because that is the plain issue. Of course, that you must find beyond a reasonable doubt.

The next point is: "Nor was said drug a harmless relief." I do not need to say anything in particular upon that point. That has been fully argued by counsel, and I can not go into the evidence. It is a question for you. Of course, if you find, beyond a reasonable doubt, any one of these points against the defendant, then your verdict must be guilty, whatever you may do with the others, because the law provides "in any particular." Now, I will say nothing further with regard to the "harmless relief" than to refer you to the evidence, which is in your own minds. I can not tell you what the evidence is. You have the right to carefully consider it, and it is your duty to carefully consider all the evidence bearing upon the point, and to determine beyond a reasonable doubt whether, in your judgment as jurors, the case has been made out by the Government beyond that reasonable doubt. If it has been made out that it is a harmful relief and not a harmless one, then of course your verdict must be guilty. If you do not so find upon that point, your verdict would be in favor of the defendant upon that point.

The next one is: "Nor did each ounce of said drug contain 30 per cent of alcohol." I do not think I need to say anything upon that point. The evidence you know. You know the evidence of the two who analyzed it, and you know what they said. I will merely read the prayer that was granted on that subject.

"If the jury shall find from the evidence that the defendant's preparation in question contained 30 per cent of alcohol at the time of the manufacture and sale thereof, then they should find that he did not make a false or misleading statement as to the quantity or proportion of alcohol contained therein."

In this prayer the jury are instructed that under the law the defendant had the right to use in the manufacture of preparations common alcohol, which is considered to be a little more than 5 per cent water and a little more than 94 per cent pure alcohol; that is to say, alcohol composed of 94.9 per cent pure alcohol and 5.1 per cent water; and in determining whether the statements on his carton and label regarding the quantity of proportion of alcohol contained in his preparation were either true or false, the jury shall consider that 5.1 per cent of the alcohol he used, if they shall find he used common alcohol, was composed of water.

I think that those two prayers contain all that I need say upon that question. You understand the evidence.

There is one other prayer on the subject of alcohol. I will read that:

"If the jury shall find from the evidence that the statement on the carton and label of the defendant's preparation concerning the quantity or proportion of the

alcohol contained in such preparation was a true statement of the maximum or the average quantity or proportion of the alcohol contained in his preparation, such statement was in conformity with the law, and his carton and label was not misbranded so far as such statement was concerned."

These three prayers cover all that is necessary for me to say on that point.

I will read the other prayers granted, first taking up prayer No. 2 for the Government:

"The jury are instructed as matter of law that if they find from the evidence beyond a reasonable doubt that the defendant, Robert N. Harper, on the fifth day of August, 1907, or at any time between the first day of January, 1907, and the filing of this information, in the District of Columbia, did manufacture a certain liquid medicine or preparation, styled and designated 'Harper's Cuforhedake Brain Food,' or 'Harper's Cuforhedake Brane Fude,' and did on the bottle, box, or circular thereof place the following statements, designs, and devices, or any one of them, 'Cuforhedake Brane Fude,' or 'Cuforhedake Brain Food,' 'that said drug contained no poisonous ingredients of any kind;' 'that said drug was a harmless relief;' 'that each ounce of said drug contained 30 per cent of alcohol;' and if the jury find beyond a reasonable doubt that the word 'Cuforhedake' means cure for headache, and that the said drug is not a cure for headache, or that said drug contains poisonous ingredients of any kind, or that said drug was not a harmless relief, or that each ounce of said drug did not contain as the maximum quantity 30 per cent of alcohol, or that all or any of said statements were in any way false or misleading, then they shall find the defendant guilty as charged in the first count of the information; and if they further find that the said defendant, Harper, did sell and offer for sale, on the day and days aforesaid, the said drug to Frank T. Stone and S. Stuart Poole, then they shall find the defendant guilty on the fourth count of said information."

The fourth count, I believe, is a charge of selling. One charge is for making in the District of Columbia, and the other charge is for selling a misbranded article in the District of Columbia. The two are to be considered separately. If you believe that he sold a misbranded article then you will bring a verdict on the fourth count. If you believe that he misbranded in any of the ways claimed by the Government, beyond a reasonable doubt, then you shall bring in a verdict of guilty on the first count.

There is one other prayer for the Government:

"A false statement within the meaning of the act of June 30, 1906, is any statement that is untrue, erroneous, not strictly in accordance with fact, or calculated in any way to deceive; a misleading statement within the meaning of said act is any statement that may in any way tend to lead a person wrongly, or misguide, or lead astray or into error, or cause to mistake, or delude or deceive; and if the jury find that any of the statements charged as false or misleading in respect to said drug, from any point of view, or from any aspect considered, may in any way reasonably be considered untrue, or not strictly in accordance with fact, or calculated in any way to deceive, or lead into error, or cause to mistake or be deceived, then the jury should find that such statement or statements are false or misleading, and that said drug is misbranded."

In considering the expert testimony, a prayer was prepared, which was also read, but I will read it again:

"The jury are instructed that the evidence of the expert witnesses who have testified in this case is to be received and treated by them precisely as other testimony. The weight to be given to it by the jury is to be determined by the character, the capacity, the skill and experience, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, by the nature of the case, and all its developed facts."

In other words, I charge you, in substance, that in testing the evidence of experts you have the right to consider whether they have shown sufficient knowledge, and to consider their conduct upon the witness stand, everything about them that has occurred in your sight, and everything that they have given upon the witness stand, for you are the ones to determine the weight to be given to the testimony of experts or those who come to testify as experts.

The law presumes that a person charged with a crime is innocent until he is proved by competent evidence to be guilty. To the benefit of this presumption the defendant is entitled, and this presumption stands as his sufficient protection, unless it has been removed by evidence proving his guilt beyond a reasonable doubt. That, you gentlemen understand, has been charged you over and over again. The right of a defendant in a court of law in this country is that he stands before you as innocent until he is proven by competent evidence guilty beyond a reasonable doubt.

Here is another prayer granted for the defense:

"The jury are instructed that under the act under which this information is filed the defendant is not required to state on the label or package containing the preparation in question any of the ingredients contained therein except the quantities or proportions of acetanilid and alcohol."

Whilst that is true, yet the statement upon the label of the proportion of those two ingredients, if there are other statements upon the carton or label, or other document a part of the carton, which are false and misleading, the fact of the statement of the two drugs would not take away the character of the misleading statements. For instance, the ordinary purchaser of such drugs at a drug store does not know the value or the effect of these several drugs, and if there is put upon the outside of the package the quantity of this drug, and at the same time a statement that there are no harmful ingredients in it, or no poisonous ingredients in it, the fact that the label would show that there was a poisonous or harmful ingredient in it, if such were the fact, would not remove the liability to a penalty under this law, because it is the ordinary purchaser that we are dealing with. The ordinary purchaser does not know, except in some few instances of well-known poisons, the nature of the various ingredients going into drugs. If there is that which is false or misleading upon any part of that which is sold accompanying the drug, he would be liable under the provisions of this act.

Here is a prayer granted to the defense which is somewhat on that line:

"The jury are instructed that the purpose of the act of June 30, 1906, was to prevent the public from being deceived or misled in the purchase of drugs, and that the defendant can not be found guilty of misbranding his preparation unless on the label, bottle, or package of his drug he made any false statements or such statements concerning the same as would naturally and reasonably deceive or mislead or tend to deceive or mislead."

The jury are further instructed that in order to convict the defendant in this case of the offenses charged in the information, or either of them, they must believe and find beyond a reasonable doubt that all or some one of the alleged false or misleading statements are or is false or misleading in some particular.

Another prayer:

"The jury are instructed that the burden of proof in this case is upon the prosecution, and before they can find the defendant guilty the evidence adduced must satisfy them beyond a reasonable doubt that the statements contained on the label or package of the defendant's preparation or the printed matter connected therewith or some one or more of said statements was or were false or is misleading."

That covers all the prayers.

Gentlemen, in considering this case, you do not want to take into consideration the position or standing of the defendant. Everyone that appears before the bar of this

Court stands on an equal plane, as far as the verdict of the jury is concerned. We are not trying Mr. Harper, the president of the American National Bank, or Mr. Harper, the president of the Chamber of Commerce; but we are trying here Robert N. Harper, a citizen of the District, and you gentlemen are sworn to try the case, standing between the defendant on one side and the United States on the other.

You have nothing to do with the question, as counsel have told you, of the penalty. You are here to determine the plain questions of fact that are presented.

If you find any one of the charges brought by the Government in the first count against Mr. Harper, although you may find him not guilty on all the others, any one of them would be sufficient and would require you to bring in your verdict of guilty, because if he is guilty beyond a reasonable doubt upon any one of the charges of false or misleading statements coming under the word "misbranded," then he is guilty, because the law requires that when a man puts out to the general public a drug he shall put on that no statement, he shall put on that no label which is false or misleading in any particular. If you find that this has been done, that there is a false or misleading statement in any particular upon this preparation put out by Mr. Harper, then your verdict must be "Guilty."

If, however, you find that in no one of the points named has Mr. Harper made a statement which is false or misleading, then, of course, your verdict would be in favor of Mr. Harper and would be "Not guilty."

If you find him guilty upon the first count and find that he sold this article to the firm of Stone & Poole, then you would find him, in that connection, guilty on the fourth count. If, however, you find him not guilty on the first count, you must necessarily find him not guilty on the fourth count.

MR. TUCKER. Has your Honor concluded?

THE COURT. Yes; unless there is something that counsel wants me to say further.

MR. TUCKER. What I want to say is this: Under the rule established by the Court of Appeals, where instructions are repeated in the charge of the Court, it is necessary for the parties to reserve their exceptions again to the prayers, repeating their exceptions. I accordingly except, for the reasons I have stated, to the granting of each and every of the prayers granted on behalf of the prosecution, and to the refusal of the Court to grant each and every of the prayers presented on behalf of the defense and refused, and to the modification of the Court to such of the defendant's prayers as have been modified by the Court; all on the grounds I have stated.

THE COURT. There was only one, I think.

MR. TUCKER. Only one, I think. I simply put it in the plural to cover any possibility.

I also object and reserve an exception to the language of the Court in the charge relating to the subject of dosage, and in instructing the jury, in effect, that they should disregard the dosage as prescribed on the label of the defendant's bottle.

I also object and except to such part of the charge as stated to the jury that the ordinary purchaser does not know the nature of the ingredients in drugs, as a rule, on the ground that that is a matter for determination by the jury.

THE COURT. Gentlemen, take the case.

On March 12, 1908, the jury returned a verdict of guilty. On April 15, 1908, the court pronounced judgment and sentence upon the verdict as follows:

THE COURT. Gentlemen, I shall do in this case what I do not ordinarily do in a case which has been tried by a jury, and where the jury has found the defendant guilty, and that is, give reasons why I impose the sentence which I have determined to impose.

Before any controversy occurred in the newspapers, or in any other way, whilst the evidence and the facts in this case were very fresh in my mind, I studied over the

question of the penalty that I ought to impose and made up my mind what that penalty ought to be. I see nothing in the evidence in the case at this time which ought to make me change the deliberate judgment which I formed at the time, after the verdict of the jury; and I shall carry out in my judgment the opinion I then formed for myself.

The penalty imposed upon a person found guilty of the violation of a law is for three purposes: First, as a punishment for committing the offense; secondly, to accomplish the reformation of the guilty party; and third, to deter others from committing the same offense.

In this case, as to the first point, what is, as a matter of right and justice between the United States on one side and the defendant on the other, a proper punishment for the offense committed?

The defendant is a druggist—an expert. He has appeared in this Court, in other cases, as such expert, testifying as to the effect and about the character of drugs. According to his own testimony, he is thoroughly qualified for giving such evidence. To be sure, for many years he had prepared and sold this preparation. It is true that up to the 1st of January of last year there was no law, as far as the Court is advised, which would hinder him from making, selling, and branding the preparation as he did. Whether that law to which Mr. Baker referred would, or not, I am not advised. This law, under which this case was brought, was passed on the 30th of June, 1906. It went into effect six months afterwards, thus giving all parties an opportunity for changing their labels and their other printed matter, if their preparation was in any way misbranded. The law went into effect on the 1st day of January, 1907.

According to the evidence here, the defendant made no change in the complained-of matter until this preparation was purchased by the Government in August, eight months afterwards. He did not consult counsel until October, ten months afterwards; but, according to the evidence, during all those months he continued to make and to sell this preparation and, according to the testimony of the many druggists who appeared in court, to sell in very large quantities. They purchased it from him in greater or less quantities; usually weekly.

During all of that period until October, the complained-of labels were on the packages as sold. One of the complained-of labels was the "Cuforhedake Brane Fude." As to the word "Cure," as counsel know, I was with the defense on that question. The other one, "Brane Fude," and the other, also, that "this preparation contains no poisonous ingredients" and that it was "a harmless preparation" were, in my judgment then, as now, a misbranding of this drug.

Whether or not it did contain poisonous ingredients Mr. Harper, an expert, knew. He could not have been mistaken. It did not require any advice from Professor Wiley, or from the Agricultural Department, to inform him, for many years an expert druggist, what was testified to by so many witnesses—that this did contain poisonous ingredients.

It was not, in my judgment, and as I charged the jury, a question of dosage. The question was, Did it contain a poisonous ingredient, and was that a misbranding under the law? If it was, Mr. Harper must have known it; and he went on for ten months selling it with that misbranded, misleading statement on it. As to this, the witnesses for the defense, and among others Professor Hurd, the chemist, said more than once that the ingredients were poisonous ingredients; although they testified that, in the doses prescribed, it would not harm. Yet here, upon his papers, and upon every bottle sold, was the statement, "This preparation contains no poisonous ingredients." It did not say that it would not be poisonous in the doses named. It did not say that there would be no harmful effects from the number of doses taken as prescribed; but it was an absolute statement which would tend to mislead an unprofessional person who might read that statement.

Now, the offense, it seems to me, is a serious one because Mr. Harper must have known this. He could not help but know that these statements were misleading, were not true, and that the bottles did contain a poisonous ingredient. I therefore can not agree with counsel for the defendant that this was an accidental or, you may put it, an unintentional, technical violation of the law.

Now, with regard to these visits to the Agricultural Department. The Agricultural Department and its officers were right in refusing to construe the law. They were not a court. They were not, I assume, lawyers; and the matter was one for a court, and for the man who was himself manufacturing the drug, to determine whether or not the labels that he put upon the package were or were not misleading under the language of the law; and it was for the courts to determine, afterwards, what the statute meant and how it was to be construed. So with regard to that I can not concede that Mr. Harper is an innocent violator; a technical violator. He went on for eight months selling his bottles by the thousands, to everybody, with those misleading statements upon them; and it was only after the Government sent the notice from the Agricultural Department in October that he consulted counsel and changed his label.

Now, concerning reformation. I do not think there is any need for my saying anything about that. I do not believe that Mr. Harper from this time on will put onto his labels or onto his bottles any such misleading statements. I think that that purpose of the law has been accomplished.

As to the deterrent effect upon others. I happen to know that during the whole of this trial there was one, and possibly there were more, counsel from abroad in court, watching this case, having no part in it in any way. He was representing the Wholesale Drug Association, and he told me that his purpose was to notify the druggists in every part of the United States of the action of the Court and of the charge made by the Court upon the law, so that everyone would be instructed upon the law. I therefore believe, with counsel for the defense, that as far as the general public is concerned and as far as the druggists are concerned, there has been full notice, and that they will be exceedingly careful as to violating this law in the future.

With regard to this case being a test case, I merely want to say one word. It does not strike me as having been a test case in the sense in which that word is usually used. A test case is one where there is a doubt about the meaning of the law, and counsel for the Government and counsel for the defense get together to test the question, so that the courts may determine the law. I do not think that anything of that kind occurred in this case. The defendant was, after notice from the Agricultural Department, brought into Court under this information. There was not a thing that would bring it within the ordinary meaning of a "test" case.

Now, coming back to the question of what the punishment should be. I do not think, this being the first case under the law, and Mr. Harper having shown a willingness to change his label, although it was after October and after he had gone once or twice to the Department before January—I do not think that I ought to impose a jail sentence.

This is the first case under this law. It is, in one sense, a test case, in that the law is for the first time construed by a court and a rule laid down which, if sustained by the Court of Appeals, will be the rule throughout the United States.

Therefore I think that the penalty imposed upon Mr. Harper should be the maximum money penalty. That is what I determined, as I said, immediately after the trial of the case and the verdict of the jury.

I shall therefore sentence the defendant, on the first count, to pay a fine of $500, and in default to be imprisoned for ninety days in jail; on the fourth count to pay a fine of $200, and in default to be imprisoned for sixty days in jail, to take effect upon the expiration of imprisonment in jail under sentence imposed on first count.

Motions by the defendant in arrest of judgment and for a new trial were severally made and overruled, and notice was given of appeal to the Court of Appeals of the District of Columbia. Subsequently the appeal was withdrawn and the fine paid.

H. W. WILEY,
F. L. DUNLAP,
GEO. P. MCCABE,
Board of Food and Drug Inspection.

Approved:
WILLIS L. MOORE,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *October 14, 1908.*

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